

DA 95-1679

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
GTE Telephone Operating Companies)	Transmittal Nos. 909, 918
)	
Revisions to Tariff F.C.C. No. 1)	CC Docket No. 94-81
)	
)	

ORDER

Adopted: July 28, 1995; Released: July 28, 1995

By the Chief, Common Carrier Bureau:

1. On April 22, 1994, GTE Telephone Operating Companies (GTOC), on behalf of the General Telephone Company of California (GTECA), filed Transmittal No. 873 to establish the rates, terms, and conditions governing GTECA's provision of video channel service to Apollo CableVision, Inc. (Apollo), a cable company providing cable television service in Cerritos, California. On that same day, GTECA also filed Transmittal No. 874 to provide video channel service to an affiliated company, GTE Service Corporation (Service Corp.). Prior to that time, GTECA had been providing video channel service to both Apollo and Service Corp. on a trial basis under a five-year authorization granted in 1988, pursuant to Section 214 of the Communications Act of 1934 as amended (Act).¹ That authorization permitted GTECA to construct and operate the facilities necessary to provide video channel service. The Commission also had granted GTECA a five-year waiver of the cable-telephone cross-ownership ban² so that it could provide video programming to end users in Cerritos. GTECA stated that it submitted Transmittal 874 to enable Service Corp. to continue providing cable service to Cerritos subscribers after the waiver expired on July 17, 1994.³

¹ General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (Waiver Review Order).

² Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

³ Transmittal No. 874, Description and Justification (D&J) at 1.

2. On July 14, 1994, the Common Carrier Bureau (Bureau) suspended Transmittal 873, and initiated an investigation into various issues raised by this tariff filing.⁴ The Bureau also granted GTOC interim authority under Section 214 to continue to operate the facilities necessary to provide video channel service to Apollo. In the same Order, we found that Transmittal 874 violated the Act and the Commission's rules that prohibit telephone common carriers from providing video programming directly to end users in their telephone service territory, and, accordingly, we rejected Transmittal 874.⁵ We granted GTOC a 60-day period to comply with the telephone-cable cross-ownership restriction, so as to avoid any abrupt termination of cable programming service provided by Service Corp. to subscribers in Cerritos.⁶

3. On September 7, 1994, the United States Court of Appeals for the Ninth Circuit stayed the Cerritos Tariff Order "insofar as it rejects Transmittal 874."⁷ On September 9, 1994, GTOC filed Transmittal No. 909 to add to its tariff the material it removed in response to the rejection of Transmittal 874. Thus, the revisions introduced in Transmittals 909 and 874 were identical. The Bureau concluded that Transmittal 909 raised substantial questions of lawfulness, suspended the tariff for one day, imposed an accounting order, and included Transmittal 909 in the pending investigation of Transmittal 873.⁸

4. In GTE v. FCC, the Court of Appeals held that GTECA's Section 214 authority for Transmittal 909 expired with the expiration of the cross-ownership waiver.⁹ GTECA subsequently filed a petition for rehearing before the Court of Appeals, and that petition was denied on May 19, 1995.¹⁰ We recognize that a district court has enjoined our enforcement of the statutory restriction¹¹ against a local exchange carrier's provision of video programming

⁴ GTE Telephone Operating Companies, CC Docket No. 94-81, 9 FCC Rcd 3613 (Com.Car.Bur. 1994) (Cerritos Tariff Order) (applications for review pending).

⁵ Id. at 3615 (para. 16). See Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

⁶ Cerritos Tariff Order, 9 FCC Rcd at 3615 (para. 18)

⁷ GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed Sept. 7, 1994).

⁸ GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 909, CC Docket No. 94-81, 9 FCC Rcd 5229 (Com.Car.Bur., 1994) (Transmittal 909 Suspension Order) at para. 3; citing Cerritos Tariff Order, 9 FCC Rcd at 3615 n.38.

⁹ GTE California, Inc. v. FCC, 39 F.3d 940, 944-45 (9th Cir. 1994) (GTE v. FCC).

¹⁰ GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed May 19, 1995).

¹¹ Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

to end users.¹² We conclude, however, that that holding does not affect our authority to require GTECA to obtain authorization under Section 214 of the Act in order to maintain and operate the facilities it uses to provide transmission service offered under Transmittal 909.¹³ Since the Ninth Circuit has rejected GTECA's position that its Section 214 authority survived the expiration of its cross-ownership waiver and has lifted the stay of the Cerritos Tariff Order, it is now indisputable that GTECA does not have Section 214 authority for the facilities it uses to provide the service for which it has filed the tariff revisions covered in Transmittal 909. On July 28, 1995, GTECA submitted a request for Section 214 authorization for the facilities it uses to provide video channel service to GTE Service Corp. in Cerritos, stating that it would be necessary for it to cease providing this service to GTE Service Corp. without this authorization. GTE requested that its application be granted on an expedited basis.¹⁴

5. Accordingly, we hereby direct GTOC either to apply for Section 214 authority within 15 days of the release date of this Order, or to notify us within that period that it intends to remove from its tariff the service it introduced in Transmittal 909 and to do so within 60 days of the release date of this Order.¹⁵ If GTOC seeks Section 214 authority, we will grant GTOC temporary Section 214 authority to provide video channel service to Service Corp. while its application is pending. In that event, we will discuss the need to designate additional issues for investigation of Transmittal 909 in a subsequent Order. Alternatively, if GTOC withdraws this service, then the related portion of this investigation becomes moot, and it will not be necessary to designate additional issues in this investigation.

6. On July 26, 1994, GTE Service Corp. filed a motion for stay of the Cerritos Tariff Order with the Commission. National Cable Television Association (NCTA), Apollo CableVision, Inc. (Apollo), and the City of Cerritos, California (City of Cerritos) filed

¹² See GTE South, Inc. v. United States, No. 94-1588-A, (E.D. Va., Jan. 13, 1995). See also Chesapeake and Potomac Telephone Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994) (C&P v. United States); US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994) (US West v. United States).

¹³ See GTE v. FCC, 39 F.3d at 945-47 (as a result of the expiration of GTECA's Section 214 authority, the Court did not need to reach the constitutionality issue in that case).

¹⁴ Letter from Whitney Hatch, GTE, to Secretary, FCC, July 28, 1995.

¹⁵ The Commission is currently considering whether to establish blanket Section 214 authorization for LECs to construct or acquire a cable television system within its service area. See Public Notice, Supplemental Comments Sought on Possible Grant of Blanket Section 214 Authorization, CC Docket No. 87-266, DA 95-665 (released Apr. 3, 1995). Because the Commission has not yet granted any such blanket authorization, and because the blanket authorization under consideration is for cable television service rather than the video channel service that is the subject of this proceeding, GTECA is required to obtain Section 214 authorization or remove this service from its tariff.

comments opposing this motion for stay. In light of the court of appeals' stay and its subsequent decision to lift the stay, we dismiss Service Corp.'s motion as moot.

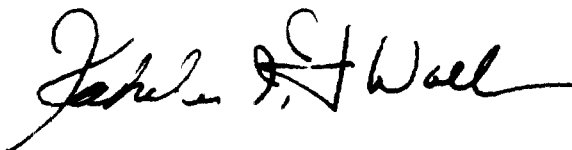
7. Accordingly, IT IS ORDERED that the motion for stay filed by GTE Service Corporation IS DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, that the GTE Telephone Operating Companies SHALL COMPLY WITH one of the following: (1) FILE an application for Section 214 authority to use its facilities to provide the service furnished under its Transmittal No. 909, no later than 15 days from the release date of this Order; or (2) NOTIFY the Bureau in writing, no later than 15 days from the release date of this Order that GTOC intends to terminate the service provided under Transmittal No. 909 and file tariff revisions, on five days' notice, to remove the unlawful portions of the tariff, no later than 60 days from the release date of this Order.

9. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, that if the GTE Telephone Operating Companies choose to seek Section 214 authorization, then the GTE Telephone Operating Companies ARE GRANTED interim authority to provide video channel service to GTE Service Corporation during the pendency of that application.

10. IT IS FURTHER ORDERED that, if GTE Telephone Operating Companies files tariff revisions to remove the material filed under Transmittal No. 909, Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, is hereby waived for that purpose. GTE Telephone Operating Companies should cite the "DA" number of this Order as the authority for that filing.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Kathleen M.H. Wallman", written in a cursive style.

Kathleen M.H. Wallman
Chief, Common Carrier Bureau